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Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 22 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Advanced Television Systems and
Impact Upon the Existing
Television Broadcast Service

MM Docket No. 87-268

To: The Commission

Petition for Clarification and Partial Reconsideration
of Association of America's Public Television Stations,
Corporation for Public Broadcasting and
Public Broadcasting Service

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The Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB") and the Public Broadcasting Service ("PBS") (collectively referred to as "Public Television") respectfully submit this Petition for Clarification and Partial Reconsideration of the Commission's Second Report and Order/Further Notice of Proposed Rulemaking released May 8, 1992 in the above-captioned proceeding ("Second Report"). Because of the importance of the issues in this proceeding to public television stations' ability to continue providing the highest quality television service to the American public, Public Television has actively participated in all phases of this proceeding.

For the reasons set forth below, Public Television believes the Commission must clarify that it will reserve specific ATV channels exclusively for noncommercial use at the time it adopts

the Final Table of ATV Allotments. Public Television also urges the Commission to reconsider its decision to subject noncommercial licensees to the two-year deadline for filing protected applications for ATV channels.

SUMMARY OF PETITION

Public Television is pleased that the Commission has reaffirmed its historic policy of reserving spectrum for noncommercial use and recognized again the importance of noncommercial broadcasting to the country. It is concerned about how that policy will be implemented in the process of assigning ATV channels, however, because the procedure proposed by the Commission to assign ATV channels does not ensure that ATV spectrum will be reserved exclusively for noncommercial use. Public Television believes that unless channels are reserved at the time the Commission issues its Final Table of Allotments, many communities will end up with inferior noncommercial ATV channels or, even more significantly, no noncommercial ATV channels at all. Such a result would undermine the long-standing Congressional policy of assuring a public television service that is comparable in technical quality to commercial service and that covers as much of the nation as is feasible.

Accordingly, Public Television urges the Commission to adopt a Table of Allotments and Assignments which pairs existing NTSC and ATV channels for all licensees, as proposed by the Broadcast Caucus, and specifically reserve those ATV channels that are paired with reserved NTSC channels. Alternatively, if the Commission

adopts a first-come, first-served application procedure, as proposed, Public Television urges the Commission to reserve specific ATV channels exclusively for noncommercial use at the time it adopts the Final Table of Allotments.

Public Television also requests that the Commission reconsider its decision to require existing noncommercial licensees and permittees to file their ATV applications within two years of the adoption of an ATV standard or the Final Table of Allotments in order to be protected against competing applicants. As the Commission has long recognized, noncommercial entities require substantial periods of time to arrange financing of the magnitude that will be involved in the transition to ATV. Thus, many public television stations may be unable to meet the Commission's requirements in order to be able to file applications for ATV channels within the two-year window.

While the Commission has indicated that it will give noncommercial licensees flexibility to complete construction where their financing is dependent on governmental sources, that relief is inadequate. Commission rules prohibit the filing of contingent applications, and the current application form requires applicants to certify that they reasonably believe they have any necessary nongovernmental financing at the time they file their applications. Many public television licensees simply will not be able to make the required financial certification within two years of the adoption of an ATV standard or the Final Table of Allotments. Accordingly, public television licensees must be given additional

time to file ATV applications if the Commission is to achieve its stated intent of preserving the important role played by noncommercial licensees among the nation's broadcast services.

ARGUMENT

I. The Commission Should Clarify the Timing of, and Procedure for, Noncommercial ATV Channel Reservations.

Public Television is gratified by the Commission's strong statement of its commitment to continue taking into account in spectrum planning the "important role noncommercial educational stations play in providing quality programming to the public and the financial constraints they face in building and running their stations." Second Report at ¶ 36. The Commission has given new life to that historic policy by adopting the following guidelines designed to ensure that ATV channels are available for noncommercial stations:

[W]e conclude that we will use vacant noncommercial allotments for ATV only where there is no feasible alternative for assigning an ATV channel to an existing broadcaster. Similarly, we will leave vacant noncommercial allotments without an ATV channel pair only when there is no other practicable way to award an existing broadcaster an ATV channel. We will in no event use a vacant VHF channel allotment reserved for noncommercial purposes for commercial ATV. Moreover, only as a last resort will we delete a reserved channel, or use for commercial purposes an ATV channel that would otherwise be paired with a vacant noncommercial allotment, where that channel or allotment would be necessary to provide first noncommercial full-service Grade B coverage to a community. As Public Television suggests, if it is impossible to pair an ATV channel with a vacant noncommercial allotment, we will protect the vacant allotment with both NTSC and ATV separation requirements, provided that ATV spacing is, as anticipated, less than or equal to NTSC spacings.

Second Report at ¶ 37 (footnotes omitted).¹

These guidelines reflect a commitment to preserve currently reserved spectrum during the transition to ATV and to reserve additional spectrum so that noncommercial stations will be able to provide ATV service. Public Television is concerned, however, about the manner in which this commitment to reserving ATV spectrum will be implemented. The Commission has neither proposed a procedure to ensure that ATV channels will be reserved nor addressed the timing of such reservations.

Given the Commission's concurrent proposal to process ATV applications on a first-come, first-served/lottery basis,² the procedure the Commission will use to set aside noncommercial ATV channels and the timing of such reservations are of critical importance if the Commission's commitment to noncommercial ATV service is to be meaningful. Indeed, the timing of the reservations will have a profound effect on whether long-standing Congressional and Commission policies fostering public television service that is comparable in technical quality to commercial

¹ The Commission indicates that, in determining whether there is any feasible way to assign an ATV channel to an existing broadcaster without either using a vacant noncommercial allotment for ATV or leaving a vacant noncommercial allotment without a paired ATV channel, it will "conduct such an evaluation of feasible alternatives on a case-by-case basis, including consideration of other practicable engineering solutions." Second Report at n.97.

² See Second Report at ¶ 35.

television service³ and available throughout the nation⁴ will be fulfilled in an ATV environment.

A. The Commission's Channel Assignment Proposal

In the Second Report, the Commission proposes to require all existing television licensees, both commercial and noncommercial, to negotiate with each other in an attempt to reach agreement on the pairing of NTSC and ATV channels either nationwide or on a market-by-market basis. See Second Report at ¶ 35. Those negotiations would take place after the Commission issues a Further Notice proposing the Final Table of Allotments. Id. If the stations are successful in negotiating agreements on channel pairings, the Commission would take those negotiated agreements into account in preparing the Final Table of Allotments/Assignments and, presumably, incorporate them in that Table. See Second Report at n.88.

Once the period for industry negotiations ends, channels in markets where broadcasters are unable to agree on a pairing plan

³ See, e.g., Public Television Financing Act of 1988, U.S. House of Representatives, H.R. Rep. No. 825, 100th Cong., 2d Sess. 14 (1988) (critical that public broadcasting be able to take advantage of technologies such as advanced television technologies including HDTV); Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (1967), S. Rep. No. 22, 90th Cong., 1st Sess. 1 (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 1772, 1778 (noncommercial educational programs must approach the highest possible program standards).

⁴ See, e.g., Educational Television Facilities Act, Pub. L. No. 87-447, 76 Stat. 64 (1962); H.R. Rep. No. 572, 90th Cong., 1st Sess. 13 (1967).

would be open to applications on a first-come, first-served basis. In the case of simultaneously filed applications, the Commission proposes to utilize a "random ranking" procedure. Under such a procedure, the applicant chosen first by lottery would be given its first choice channel, the next-ranked applicant would be given its highest choice channel that does not conflict with the choice of the first-ranked applicant, and so on. See Second Report at ¶ 35.⁵

While this procedure might work to assign channels to those licensees who apply for an ATV channel, it is unclear how it would assure that ATV channels are reserved for noncommercial use, particularly where existing noncommercial licensees cannot, for financial or other reasons, apply for an ATV channel within the two-year protected filing window. Similarly, this procedure would not assure that ATV channels are paired with vacant noncommercial allotments, since there will probably be no applicant to apply for those channels during the initial filing window.

Moreover, channels cannot be reserved through the application process alone even if noncommercial applicants apply for the channels. Setting aside a channel exclusively for noncommercial use constitutes a modification of the Table of Allotments, and thus is a rule making action.⁶ Even if noncommercial applicants apply

⁵ Public Television will comment separately on the proposed first-come, first-served/random ranking procedure in its Comments on the Further Notice of Proposed Rulemaking, to be filed July 17, 1992.

⁶ See, e.g., Amendment of Table of Allotments (Anchorage, Palmer and Seward, Alaska), 5 FCC Rcd 7570 (1990).

for the channels during the two-year filing window, the Commission will have to conduct another rulemaking later to reserve the channels for noncommercial use. It would not be sufficient for the Commission simply to assign unreserved ATV channels to noncommercial stations because those channels would be vulnerable to competing applications filed by commercial entities when the noncommercial applicant files a renewal application.

B. The Commission Must Establish a Workable Mechanism for Pairing Existing Reserved NTSC and New ATV Channels.

In view of these concerns with the Second Report, Public Television asks the Commission to clarify that it will adopt a workable mechanism for implementing its policy of reserving ATV channels for noncommercial use. Pairing ATV and NTSC channels, as the Broadcast Caucus has proposed, and reserving the ATV channels that are paired with currently reserved NTSC channels will achieve that end. However, if the Commission does not follow that route, it must adopt some other mechanism by which ATV channels are reserved for noncommercial use. Without such a mechanism, the Commission cannot meaningfully implement its commitment to ensure that the nation's public television system is preserved in an ATV world.

The Commission historically has reserved channels for noncommercial use because of the importance of the public service offered by noncommercial broadcasters and because it has recognized that noncommercial entities generally do not have the resources to

compete effectively with commercial applicants for spectrum. Public broadcasters need longer lead time to raise funds than their commercial counterparts.⁷ Public television licensees are dependent on governmental appropriations at both the federal and state levels, foundation grants and corporate and viewer donations to fund capital improvements. They typically need substantial lead time to structure and implement a capital campaign to raise funds from the private sector. Where funding is to come from the legislature, licensees need time to educate legislators of the need for their proposed capital improvements and for governmental funding of those improvements. Additional time is required for legislative bodies to appropriate the funds -- particularly when the appropriations are of the magnitude that will be necessary to construct ATV facilities.⁸

These funding realities will severely disadvantage noncommercial stations under the Commission's proposed application scheme in three ways. First, during the industry negotiations that are to take place prior to adoption of the Final Table of Allotments, commercial broadcasters may not negotiate seriously

⁷ See Comments of APTS, CPB, and PBS in MM Docket No. 87-268, filed December 20, 1991, at 3-8.

⁸ Several state legislatures meet only once every two years and for relatively short periods of time. Securing appropriations of the size required for ATV conversion will be difficult in a single legislative session, especially at a time when most state legislatures are having difficulty meeting funding requirements for existing programs.

with noncommercial stations regarding a pairing plan because they will be aware that many noncommercial licensees will not be able to compete for channels in the initial random ranking procedure if the negotiations prove unsuccessful. Commercial stations will have little incentive to negotiate with stations they do not believe will be in a position to file for ATV channels on the first day applications are accepted.⁹

Second, noncommercial stations that cannot apply for ATV channels on the first day applications are accepted would be severely disadvantaged under the first-come, first-served application procedure proposed by the Commission because they would not be able to participate in the initial lottery. Those noncommercial stations that apply for channels later during the initial two-year filing window are likely to end up with the least desirable channels. That could result in a reduction of the coverage areas of those stations. It could also make it more expensive for them to construct their ATV facilities since stations left with the least desirable channels in their communities may not be able to co-locate their ATV and NTSC transmitters.

Finally, the Commission's failure to reserve specific channels exclusively for noncommercial use would have the most serious

⁹ Indeed, the prospect of Commission reservation of channels exclusively for noncommercial use prior to acceptance of ATV applications should encourage commercial stations to reach agreement with noncommercial stations at the pre-application stage -- thus making unnecessary Commission selection of the channels to be reserved.

consequences for those communities in which the noncommercial stations cannot secure funding and apply for channels within the proposed two-year filing window. Many noncommercial stations are likely to be in that position. Those stations, as well as other noncommercial applicants, would be forced to compete with the many commercial interests -- not limited to existing broadcasters -- that are likely to apply for any ATV channels remaining after the initial filing window closes. Under those circumstances, many noncommercial applicants may be unable to obtain ATV channels and, as a result, many communities around the country would be deprived entirely of noncommercial ATV service.

For these reasons, Public Television urges the Commission to clarify that it will adopt an assignment mechanism that will implement its commitment to protect and reserve noncommercial allotments in an ATV world. Specifically, Public Television urges to the Commission to adopt the channel pairing plan proposed by the Broadcast Caucus and to reserve the ATV channels that are paired with reserved NTSC channels.¹⁰ By issuing a Table of Allotments and Allocations based on objective coverage and interference factors with specific channels set aside exclusively for noncommercial use, the Commission would ensure, as it intends, that each NTSC reserved channel is paired with a reserved ATV channel.

¹⁰ Two of the Public Television parties, APTS and PBS, are members of the Broadcast Caucus and signatories to the Joint Comments.

If the Commission rejects this approach in favor of its proposed first-come, first-served application procedure, Public Television submits that the only way to meaningfully protect noncommercial reservations is to set aside specific ATV channels for each current NTSC reserved channel at the time it adopts the Final Table of Allotments.

As discussed at length above, the first-come, first-served application process would severely disadvantage noncommercial licensees. They would be unable to compete effectively for desirable channel assignments, and in some communities, the procedure is likely to result in the loss of paired ATV channels for reserved NTSC allotments. Failure to reserve channels for noncommercial use in the Final Table of Allotments prior to acceptance of applications would thus nullify the Commission's commitment to protect noncommercial allotments in an ATV world. Moreover, it would thwart achievement of Congress' goal of assuring nationwide noncommercial service and fostering noncommercial television service comparable in technical quality to commercial broadcasting.¹¹

¹¹ Public Television recognizes that the Commission will need some basis on which to select which channels are to be reserved. That issue is directly related to the manner in which ATV channels will be assigned and thus is technically the subject of the Further Notice of Proposed Rule Making. In its Comments in response to the Further Notice, Public Television will urge the Commission, if it rejects the assignment mechanism proposed by the Broadcast Caucus, to assign ATV channels to noncommercial stations based on principled criteria which should include whether the ATV channel is suitable for use at the licensee's existing transmitter site or a permittee's designated transmitter site and whether the ATV channel would provide coverage at least comparable to that of the station's existing NTSC channel.

II. The Commission Should Reconsider its Decision to Impose a Two-Year Application Deadline on Noncommercial Applicants.

The Commission has decided to impose specific application and construction deadlines on existing broadcasters who apply for ATV channels. Citing its concern that without a specific timetable some parties may unduly delay construction, the Commission concluded that a two-year application period will be sufficient to allow existing broadcasters to apply for ATV channels. See Second Report at ¶ 22. The Commission reasoned that broadcasters will not need more than two years "to arrange their financing and plan their facilities from the time an order selecting an ATV system becomes effective." Id. Further, it reasoned that "broadcasters who are unable to reach a negotiated settlement will have an incentive under the first-come, first-served approach to apply for an ATV channel early." Id.

While the Commission's reasoning may make sense for commercial broadcasters, it makes no sense as applied to noncommercial broadcasters and will jeopardize their ability to make the transition to ATV. As discussed above, noncommercial stations are dependent on donations, grants and governmental appropriations for capital improvements. It will take many, if not most, of the stations more than two years to raise the funds, or even the commitments, needed to ensure that they can build ATV facilities.

See page 9, supra.¹² Since most noncommercial applicants will be unable to certify within two years that they have the necessary non-governmental funds needed to construct and operate their proposed facilities, few will be able to file within the two-year window.¹³

Consequently, while the Commission's approach will serve as an "incentive" for existing licensees to apply for ATV facilities early,¹⁴ the Commission's chosen spur will only prejudice noncommercial applicants who, because of the nature of their funding sources, cannot respond to the "incentive." Moreover, the Commission's observation that delays in governmental budgetary processes can present "uncontrollable circumstances specifically justifying an extension [of time to construct]", Second Report at ¶ 27, will be of no help to those noncommercial licensees that

¹² Federal funding for public broadcasting requires substantial lead time and planning. The CPB authorization for 1996 is already determined and authorization legislation for 1997-99 is scheduled for consideration by Congress in its next session. At that point, Public Television will not be in a position even to estimate the approximate cost of ATV conversion.

¹³ In its Notice of Proposed Rulemaking, the Commission requested comment on whether it should require all applicants for ATV channels to demonstrate their financial qualifications to construct an ATV facility and operate it for three months. See Notice of Proposed Rulemaking at ¶ 23. Several commenting parties, including the Broadcasters' Caucus and Public Television, commented on that proposal. The Commission did not, however, address its financial qualifications proposal in the Second Report and Order.

¹⁴ See Second Report at ¶ 22.

cannot even apply for ATV channels because they cannot demonstrate or certify their financial qualifications.

Thus, imposing a two-year application deadline on noncommercial licensees is inconsistent with the policy underlying noncommercial reservations. Those channels were reserved because the Commission understood that noncommercial applicants would "require more time" to apply for channels than commercial stations.¹⁵ By requiring existing noncommercial licensees to meet the same application deadline as commercial stations, the Commission has ignored this basic fact and will jeopardize public television's orderly transition to ATV. Indeed, if the Commission does not reserve specific channels exclusively for noncommercial use as Public Television urges in Section I of this Petition, requiring existing noncommercial licensees to file within the two-year window will open the channels to commercial applicants.

Imposing a two-year deadline is also inconsistent with the policy adopted in the Second Report of affording existing licensees an opportunity to obtain ATV authorizations. The Commission reasoned that giving existing broadcasters priority in the assignment of ATV channels would "bring ATV to the public in the most expeditious and nondisruptive manner . . . by enabling those with relatively greater experience and expertise in broadcasting to deliver ATV service first." Second Report at ¶ 8. If that policy

¹⁵ See Sixth Report and Order on Television Assignments, 41 FCC 148, 159 (1952). See also Second Report at ¶¶ 36-37.

is to be effective as applied to public television, the Commission must afford noncommercial licensees a reasonable period of time to arrange for the capital funding required to convert to ATV.

In light of the longer time public broadcasters will need to raise funds to construct ATV facilities, Public Television urges the Commission to establish a longer application deadline for public television licensees. The Commission could set that deadline when it revisits the ultimate cut-over date to ATV. At that point, the costs of ATV equipment and other conversion costs will be well known, the demand for ATV will be established and public television should be in a position to determine how much additional time, if any, might be required to fund the conversion to ATV.

This approach will not undermine the Commission's desire to encourage the swift transition to ATV. The pressure to maintain programming comparable in technical quality to that provided by commercial stations, cable operators and other television services that are likely to utilize ATV technology will ensure that noncommercial stations implement ATV services as quickly as they can. As Public Television observed in its Comments in this proceeding, there will be sufficient public demand for public television's ATV service to assure that the funds are made available to enable public television stations to provide ATV service. That is the pattern that developed in connection with the introduction of color television service, and it should hold true

for ATV as well.¹⁶ The public television industry has unique programming and services to offer that will capitalize on ATV technology, and the public will insist that those services be made widely available.

If the Commission decides to apply the two-year application deadline to noncommercial stations, notwithstanding the considerations outlined above, then it should not require noncommercial applicants to demonstrate or certify their financial qualifications at the time they apply for ATV channels. Imposition of both a two-year application deadline and a financial qualifications requirement would virtually assure that most noncommercial stations will not be able to apply for ATV channels during the priority filing window. Given the Commission's stated intent to take into account in ATV spectrum planning "the important role noncommercial stations play in providing quality programming to the public and the financial constraints they face in building and running their stations,"¹⁷ the Commission surely cannot intend that result.¹⁸

¹⁶ See Public Television Comments at 14 n.11.

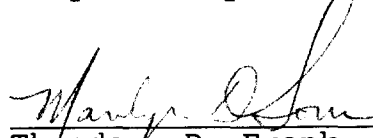
¹⁷ Second Report at ¶ 36.

¹⁸ The Commission rejected Public Television's suggestion that the Commission continue to accept applications for reserved vacant NTSC allotments after the initial filing period established for existing broadcasters. See Second Report at ¶ 51. The Commission stated that after the close of the two-year filing window, it will accept applications for unassigned ATV channels, but not the vacant NTSC channels with which they are paired. This will almost certainly result in halting any expansion of public

CONCLUSION

For the foregoing reasons, Public Television respectfully requests that the Commission clarify that it will reserve specific ATV channels exclusively for noncommercial use at the time it adopts its Final Table of Allotments and reconsider its decision to impose a two-year application deadline on noncommercial applicants for ATV channels.

Respectfully submitted,



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television service -- probably for quite a few years -- until ATV achieves substantial marketplace penetration. This is because no applicant will be able to construct and operate an ATV station without an associated NTSC facility until such time as most of the viewing audience has ATV receivers. Since there are still unserved areas in the United States and since there is a need for additional diversity in programming services, particularly for unserved and under-served areas, Public Television urges the Commission to look favorably upon requests for waivers of this policy where applicants propose to serve an unserved area or audience. A waiver would be appropriate where the applicant proposes to build both NTSC and ATV facilities and can demonstrate that ATV penetration is not yet sufficient to allow operation of the latter without the former.

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